Jasalam (M) Sdn Bhd v Wong Koon Yee

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO C-02-744 OF 1997
LAMIN PCA, AHMAD FAIRUZ AND DENIS ONG JJCA
15 FEBRUARY 2000

Land Law *— Restraints on dealings — Caveats — Application for removal of caveat — Caveator's claim of interest failed to raise any serious questions to be tried — Caveat failed to expressly limit protection to caveator's claim of portion of land — Delay in entering caveat — Whether caveator lost priority to claim on land*

The appellants purchased a piece of land from the vendors who are the registered owners via a sale and purchase agreement dated 5 November 1996 ('the SPA'). The agreed price of the sale was RM392,222.95 and the appellant paid a sum of RM45,607.32 to the vendors as deposit. In compliance with the requirement of the SPA, the appellant paid the balance sum of RM345,615.63 to its solicitors on 4 February 1997. However, the appellant has been unable to register the land in its name due the presence of a private caveat lodged by the respondent on 21 January 1997. The caveat was lodged pursuant to a purchase transaction in 1973. Thus the appellant applied to the court for the removal of the caveat but its application was dismissed by the learned judge. Hence this present appeal.

Held, allowing the appeal:

(1) In the present case, the affidavits are insufficient, on the balance of probabilities, to show that the respondent's claim to an interest in the portion of land has raised any serious questions to be tried. Consequently, the conduct or act of the respondent in registering the caveat must be a wrongful conduct or act. Hence the appellant has proved that he is an aggrieved party under s 327 of the National Land Code 1965 ('the NLC') and coupled with the fact that the respondent's claim of interest failed to raise any serious questions to be tried, the appellant is entitled to remove the caveat entered by the respondent (see p 120C–D, F–G).

(2) The proviso to s 322(1) of the NLC prohibits the entry of a caveat over part of the land. Nonetheless if a person is only claiming a registrable interest in a portion, he may caveat the whole land, provided that he expressly limit the effect of his caveat to protect only his claim. Hence the respondent's caveat is procedurally bad and ought to be removed since it fails to expressly limit its protection only to his claim of the said portion (see pp 120G–H, 121E).

(3) It was the defendant's duty to commence an action promptly if he considered himself entitled to specific performance as it is inequitable to prevent a man from dealing with his property after such a long delay and the court will not lend its assistance to such a proceeding. In the present appeal, the caveat was lodged

24 years after the 1973 sale and purchase agreement. Thus the learned trial judge was plainly wrong in the exercise of his discretion in refusing to remove the caveat (see p 122D–F).

(4) The respondent, although being first in time in acquiring the equitable ownership to the portion, has lost his priority by his indolence and omission to register his title to the portion or to enter a caveat within reasonable time. Thus the respondent's conduct has certainly caused prejudice to the appellant because had the appellant known of the respondent's equitable interest in the portion, the appellant might not have bought the land or might have bought it at a cheaper price. Under these circumstances, the appellant is entitled to priority. As such, the caveat should have been removed (see p 123F–G).

[Bahasa Malaysia summary

Perayu-perayu telah membeli sebidang tanah daripada penjual-penjual yang merupakan tuan punya-tuan punya tanah melalui perjanjian jual beli bertarikh 5 November 1996 ('PJB tersebut'). Harga jualan yang dipersetujui adalah RM392,222.95 dan perayu telah membayar wang sebanyak RM45,607.32 kepada penjual-penjual sebagai deposit. Sebagai mematuhi PJB tersebut, perayu telah membayar jumlah baki sebanyak RM345,615.63 kepada peguam-peguamnya pada 4 Februari 1997. Namun, perayu tidak dapat mendaftar tanah tersebut di atas namanya kerana kehadiran kaveat persendirian yang dimasukkan oleh responden pada 21 Januari 1997. Kaveat telah dimasukkan menurut suatu transaksi belian pada tahun 1973. Dengan itu perayu memohon kepada mahkamah untuk mengalihkan keveat tersebut tetapi permohonannya telah ditolak oleh hakim yang arif. Dengan itu rayuan ini dibuat.

Diputuskan, membenarkan rayuan tersebut:

(1) Di dalam kes ini, affidavit-afidavit tersebut adalah tidak mencukupi, di atas imbangan kemungkinan, untuk menunjukkan bahawa tuntutan responden untuk suatu kepentingan di dalam sebahagian tanah telah membangkitkan sebarang persoalan-persoalan serius yang boleh dibicarakan. Dengan itu perayu telah membuktikan bahawa beliau merupakan pihak terkilan di bawah s 327 Kanun Tanah Negara 1965 ('KTN') dan ditambah dengan fakta bahawa kepentingan yang dituntut oleh responden gagal untuk menunjukkan sebarang persoalan-persoalan serius yang boleh dibicarakan, perayu berhak untuk mengalihkan kaveat yang dimasuki oleh responden (lihat ms 120C–D, F–G).

(2) Proviso s 322(1) KTN menghalang sebarang kemasukan ke atas sebahagian tanah. Walau sekalipun jika seseorang hanya menuntut suatu kepentingan yang boleh didaftarkan ke atas sebahagian sahaja, beliau boleh mengkaveat keseluruhan tanah untuk melindungi tuntutannya. Dengan itu kaveat responden

adalah secara prosedur tidak baik dan patut dialihkan oleh kerana ia gagal untuk menghadkan secara nyata perlindungan ke atas tuntutannya sahaja di atas bahagian tersebut (lihat ms 120G–H, 121E).

(3) Adalah kewajipan defendan untuk memulakan tindakan dengan segera jika beliau berpendapat dirinya sebagai berhak kepada pelaksanaan spesifik kerana adalah tidak berekuiti untuk menghalang seseorang daripada menguruskan hartanahnya selepas suatu kelewatan yang lama dan mahkamah tidak akan membantu prosiding sedemikian. Di dalam rayuan ini, kaveat telah dimasukkan 24 tahun selepas perjanjian jual beli 1993. Dengan itu hakim yang arif adalah jelas salah di dalam pelaksanaan budi bicaranya kerana enggan mengalihkan kaveat tersebut (lihat ms 122D–F).

(4) Responden, walaupun lebih awal memperolehi pemunyaan berekuiti ke atas bahagian tersebut, telah hilang keutamaannya dengan kemalasan serta ketinggalannya untuk mendaftarkan hak milik ke atas bahagian tersebut dan untuk memasukkan kaveat di dalam masa yang munasabah. Dengan itu kelakuan defendan sudah tentu menyebabkan prejudis kepada perayu kerana jika perayu tahu apa hak ekuiti responden di atas bahagian tersebut, perayu mungkin tidak akan membeli tanah tersebut atau mungkin membelinya pada harga yang lebih murah. Di bawah keadaan-keadaan ini, perayu berhak diutamakan. Dengan itu, kaveat tersebut sepatutnya dialihkan (lihat ms 123F–G).]

Notes

For cases on application for removal of caveat, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2581–2696.

Cases referred to

Butler v Fairclough 23 CLR 78 (refd)
Chor Phaik Har lwn Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)
Chua Hee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)
Glasbrook v Richardson (1874) 23 WR 51 (refd)
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (refd)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)
N Vangedaselam v Mahadevan & Anor [1976] 2 MLJ 161 (refd)
Plimmer Bros v St Maur (1906) 26 NZLR 294 (refd)
Tan Heng Poh v Tan Boon Thong & Ors [1992] 2 MLJ 1 (refd)
Teo Ai Choo v Leong Sze Hian [1982] 2 MLJ 12 (refd)
United Malayan Banking Corp Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169 (refd)

Wu Shu Cheng (Sole Executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (refd) A

Legislation referred to

National Land Code 1965 ss 322(1), 327, 340 B

Appeal from: Originating Summons No 24–22 of 1997 (High Court, Kuantan)

David Morais (*Bodipalar* and *Sunita Nathan* with him) (*David Morais*) for the appellant. C

Joseph Au (*Omar & Joseph Au*) for the respondent.

Ahmad Fairuz JCA (delivering judgment of the court): The appellant is the purchaser of a piece of land held under GM 7965, Lot 2400, Mukim Kuala Kuantan ('the land'). The vendors namely, Mohamed Naim Bin Haji Ahmad, Che Mah bte A Rahaman and Mohd Nasir Bin Haji Ahmad are the D registered owners of the land. Both the appellant and the vendors signed a sale and purchase agreement ('the SPA') on 5 November 1996. The agreed price of the sale was RM392,222.95. A sum of RM45,607.32 was paid by the appellant to the vendors as deposit. In compliance with the requirement of the SPA, the balance sum of RM345,615.63 was paid by the appellant to its solicitors on 4 February 1997. The appellant, however, has been unable E to register the land in its name due to the presence of a private caveat lodged by the respondent on 21 January 1997. Consequently, by an originating summons dated 17 February 1997, the appellant applied for the removal of the caveat. On 28 November 1997, the learned judge dismissed the appellant's application. Hence this present appeal. F

We heard this appeal on 29 April 1999 and we allowed it with costs. At the same time we ordered the deposit to be refunded to the appellant. We now give our reasons.

The respondent claims title to or a registrable interest in a portion measuring 100 feet by 40 feet of the land. This portion was purchased by G the respondent from one Omar bin Mohamad Aris (deceased) who was then the registered proprietor of the land. The respondent has paid the full purchase price of RM8,000 to the deceased. The original issue document of title of the land was handed over to the respondent who, immediately after the execution of the sale and purchase agreement dated 22 January 1973 ('the 1973 SPA') pertaining to the sale of the portion ('the said H portion'), entered into possession of the said portion and had exercised the right of ownership to the said portion by renting the same out to various persons. The respondent had also paid all relevant quit rents and assessments due on the said land. The respondent has, however, not as yet registered his interest in the said portion of the land. Learned counsel for the respondent highlighted the fact that the 1973 SPA was prepared by the I then Mr V Balendran, a solicitor practising with the firm of Messrs Maxwell Kenion Cowdy & Jones, Kuantan. The respondent was unable to produce

a copy of the 1973 SPA as he was never handed a copy by the said solicitors despite his numerous requests for the copy. A copy of a letter dated 20 January 1978 from Messrs Balendran & Chong (formerly known as Messrs Maxwell Kenion Cowdy & Jones) was produced as evidence of the existence of the 1973 SPA (see pp 185 and 186 of the appeal record).

Before us, learned counsel for the appellant contended that the respondent's caveat is procedurally bad in that it fails to expressly limit its protection only to his claim of the said portion. Consequently, counsel submitted that the caveat must, on that ground alone, be cancelled. The appellant further argued that the evidence produced by the respondent are inherently weak and unreliable to support his claim of ownership to the said portion. No sale and purchase agreement had been produced. Only quit rents and assessment receipts were tendered as exhibits. The first assertion of ownership by the respondent was the lodging of the caveat some 24 years after the purchase transaction in 1973. These evidence, according to the appellant, show that there are no serious issues to be tried. As such, the caveat ought to be removed. It was also contended by the appellant that the claim of the respondent can be quantified in damages. Thus, the balance of convenience and justice would favour the removal of the caveat.

It is clear that, on the authority of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC) the appellant has to satisfy the trial Judge that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat (see [1979] 2 MLJ 212 (PC) at p 215F–G (column 1). Thus, the appellant, through its affidavit of 13 February1997, produced the SPA dated 5 November1996 which shows that the appellant bought the land from the registered owners of the land. The appellant had paid the full purchase price. The only obstacle to the transfer of the land title to itself is the respondent's caveat. The title of the registered owners was never challenged by the respondent. By s 340 of the National Land Code 1965 ('the NLC'), the registered owners' title to the land is indefeasible. It is therefore obvious that the appellant has shown that he is entitled to be registered as owner of the land.

As to whether the appellant is an aggrieved party under s 327 NLC, this Court had, in the case of *Wu Shu Cheng (Sole Executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 at p 499F–G, said:

> The Code contains no definition on who is an aggrieved person. To my mind, the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

On whether the act or conduct of the respondent in registering the caveat was a wrongful act or conduct, the appellant drew the attention of this court to the following matters:

(a) the respondent purported to purchase the said portion in January 1973 vide the 1973 SPA (which the respondent was unable to produce as evidence); A

(b) the respondent waited for about 24 years to enter a private caveat on the land on 21 January 1997 whilst the appellant had already entered its caveat on 8 November 1996; B

(c) the respondent's affidavits do not show that reasonable attempts had been made to secure the 1973 SPA and to register his title to the said portion;

(d) the respondent tendered quit rent and assessment receipts to support his assertion of his ownership of the land. C

These aforementioned matters, according to the appellant, are evidence which are inherently weak, unreliable and incapable of raising serious issues to be tried. We agree with the appellant. The evidence presented by the affidavits are insufficient, on the balance of probabilities, to show that the respondent's claim to an interest in the said portion has raised any serious questions to be tried. Consequently the conduct or act of the respondent in D registering the caveat must be a wrongful conduct or act. Hence, the appellant has proven that he is an aggrieved party under s 327 NLC and as envisaged by the case of *Wu Shu Cheng*.

On the issue of serious questions to be tried the Privy Council in *Eng Mee Yong*'s case held that the caveator, in an application by the E caveatee under s 327 NLC for removal of a caveat, must:

(1) satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and having done so he must;

(2) go on to show that on the balance of convenience it would be better to F maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

As we had held that the evidence tendered in support of the respondent's claim to the said portion failed to raise any serious questions to be tried, the appellant, on the strength of *Eng Mee Yong*'s case, is consequently entitle to G remove the caveat entered by the respondent.

The appellant also contended that the respondent's caveat is procedurally bad in that it fails to expressly limit its protection only to his claim of the said portion and on that ground alone the appellant is entitled to remove the caveat. He relied on the case of *Chor Phaik Har lwn Farlim Properties Sdn Bhd* [1994] 3 MLJ 345. Edgar Joseph Jr FCJ in delivering the H judgment of the Federal Court made reference to the case of *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1 wherein the then Supreme Court held that the caveat was invalid because it was expressed to bind the whole of the lands whilst the caveator's interest in the lands was limited to the eight parcels of land only. The Supreme Court also said (at p 8): I

> In our view, the fact that the caveator was entitled until the will of a one-sixth share in the eight parcels of land, did not mean that his share was ascertainable

> before administration was complete. ... As such, until the administration was complete, the value or extent of the residue on which his one-sixth share depended, remained uncertain. On established authorities, clearly the caveator in the present appeal had no caveatable claim or interests in any of the property when the caveat was entered. There was no evidence that the administration of the estate was already complete to ascertain the actual worth of the residue for final distribution.

As to the proviso, the Supreme Court said (at pp 8–9):

> The nature and effect of private caveats under s 322 is now subject to an omnibus proviso that, 'such a caveat shall not be capable of being entered in respect of a part of the land'. Thus, notwithstanding the fact that a person can bring himself under one of the categories of persons under s 323(1) at whose instance a private caveat may be entered, the registrar is now prevented from entering a caveat whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim or interest under s 323(1) relates to only part of the land. In our opinion, this is the only reasonable interpretation of the new proviso. Any other interpretation would appear to make it meaningless, and inconsistent with the Torrens system of giving certainty and indefeasibility to registration of land title, save for fraud or misrepresentation in the transfer or registration itself.

Referring to the aforementioned part of the Supreme Court's judgment on the proviso, the Federal Court in *Chor Phaik Har* said (at p 352): 'These remarks as to the effect of the proviso to s 322(1) were unnecessary to the conclusion and therefore are really obiter dicta.' The Federal Court in *Chor Phaik Har* was considering a preliminary point of law which resolves itself into the question of the true meaning and ambit of the proviso to s 322(1) of the NLC. On that point the Federal Court held that the proviso prohibits the entry of a caveat over part of the land. It also endorsed the following passages in the judgment of Suffian LP in *N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161 at pp 162–163:

> I am of the opinion ... you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim ...
>
> In that event when applying for entry of a caveat he should so state in Form 19B in para 1, and in para 2 he should give the grounds of his claim. (He should not claim a caveat to be expressed to bind the land itself.) He should also cause to be inserted in Form 19A a description of the particular interest claimed and a description of the effect of the caveat.

As pointed out by the appellant, Form 19B which is found at p 188 of the record of appeal, discloses an application for caveat of the whole land. There is nothing in para 1 of the form to indicate that the caveat is to protect the caveator's interest in the said portion. Under the circumstances, we are compelled, on the basis of the abovequoted authorities, to agree with the appellant that on that ground too, the appellant is entitled to remove the respondent's caveat.

We would now refer to the respondent's affidavit of 12 August 1997 wherein the respondent affirmed that he had filed one suit against

Messrs Balendran Chong & Bodi and another suit against the registered owners of the land that had sold the land to the appellant ('the registered owners'). Both the suits were filed on 7 July 1997, ie about six months after the respondent's caveat was lodged (which is on 21 January 1997). In the suit against the registered owners the respondent claims for specific performance of the 1973 SPA. In this connection we wish to refer to the case of *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 which is case No 18 in the respondent's bundle of authorities. The Supreme Court in that case referred to the case of *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 which in turn referred to the case of *Plimmer Bros v St Maur* (1906) 26 NZLR 294. The Supreme court held that *Teo Ai Choo*'s case does not involve a delay of lodging a caveat but involves delay in the commencement of an action by the defendant in respect of their dispute. As such the Supreme Court was of the view that *Teo Ai Choo*'s case did not avail the respondent (in the *Kumpulan Sua Betong Sdn Bhd*'s case). *Plimmer Bros*' case, like *Teo Ai Choo*'s case, involves an application by summons to remove a caveat against the land in question in the case. The summons was taken out on 30 July, more than a month after the caveat was lodged. Up to the time of hearing the summons, the defendant had commenced no action against the plaintiff for the performance of the relevant contract. Stout CJ held that it was the defendant's duty to commence an action promptly if he considered himself entitled to specific performance. The learned Chief Justice referred to the case of *Glasbrook v Richardson* (1874) 23 WR 51 which held that a delay of two months and a half was too long. In *Plimmer Bros*' case, nothing was done for nearly 16 months and then a caveat was lodged. More than a month had elapsed since then and still no action has been commenced. On this, the learned Stout, CJ then said: '*In my opinion an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious.*' The learned Chief Justice was also of the opinion that it is inequitable to prevent a man dealing with his property after such a long delay and the court will not lend its assistance to such a proceeding. The Chief Justice consequently removed the caveat.

In *Plimmer Bros*' case the caveat was lodged after 16 months. In the appeal before us, the caveat was lodged 24 years after the 1973 SPA. In *Glasbrook v Richardson* a delay of $2^1/_2$ months in instituting action for specific performance was held to be too long. The respondent in the appeal before us took six months after lodging his caveat to institute action for specific performance. Under such circumstances and in the light of *Plimmer Bros*' case and *Glasbrook*'s case we are satisfied that the learned trial judge was plainly wrong in the exercise of his discretion in refusing to remove the caveat.

Finally, we would like to refer to the case of *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 (SC) [Case No 33 in the respondent's bundle of authorities]. The Supreme Court in this case made reference to the case of *United Malayan Banking Corp Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169 ('the *UMBC* case'). The Federal Court in the *UMBC* case was considering, inter alia, the priority of two parties with

A equitable interests. The *UMBC* case is therefore relevant to the appeal before us. The respondent in our appeal claims to have bought the said portion from the registered owner. He has paid the purchase price. Assuming these facts are proven, the respondent, consequently is the equitable owner of the said portion (*Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116). Similarly, the appellant had bought the land and paid B the purchase price to the registered owners of the land.

The appellant, therefore, is the equitable owner of the land which includes the said portion. When considering which equitable interest the court should protect, the Federal Court, in the *UMBC* case said (at p 171):

C 'The law applicable was declared by the Full Court on New South Wales is *Butler v Fairclough* 23 CLR 78, in terms which were explicitly approved by the Privy Council in *Abigail v Lapin* [1934] AC 491. These are the words of the Australian court which were approved:

> 'It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates D and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the court in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. *In the case of a contest* E *between two equitable claimants the first in time, all other things being equal, is entitled to priority.* But all other things must be equal, and the claimant who is first in time may lost his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice.' (Emphasis added.)

F The Federal Court in the *UMBC* case followed the above-cited principles in the Australian case of *Butler v Fairclough* 23 CLR 78 at p 91. We would do the same in the appeal before us. Applying the abovementioned principles to this appeal, we hold that the respondent, although being the first in time in acquiring the equitable ownership to the said portion, has lost his priority by his indolence and omission to register his title to the said G portion or to enter a caveat within reasonable time. This conduct of the respondent certainly had caused prejudice to the appellant. If the appellant had known about the respondent's equitable interest in the said portion, the appellant might have not bought the land or might have bought the land at a cheaper price. Under these circumstances, the appellant is entitled to priority. As such the caveat should have been removed.

H *Appeal allowed.*

Reported by Wong Siok Chin

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